No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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Faced with indefensible rulings by the court of appeals, Independent Counsel advances different positions. As to attorney-client privilege, he disavows the court of appeals' balancing approach, instead arguing flatly that "the attorney-client privilege does not apply in federal criminal proceedings when the client is deceased." Br. 9 (upper case omitted). Indeed, he specifically asks this Court to order production of relevant portions of the notes, although the court of appeals required the district court to engage in a balancing process before ordering production. Pet. App. 10a-11a, 13a-14a; compare Br. 41 n.40, 49. Because Independent Counsel did not file a cross petition, his request to alter the judgment is improper. *Northwest Airlines v. County of Kent, Michigan*, 510 U.S. 355, 364-65 (1994); Stern & Gressman, *Supreme Court Practice* (7th ed.) § 6.35.

As to work product, Independent Counsel does not attempt to defend the court of appeals' holding that notes of an initial client interview cannot reflect the attorney's

mental processes, arguing instead that the work product privilege, like the attorney-client privilege, expires with the client's death. He also seeks an order directing production of all relevant portions of the notes, a relief broader than that entered by the court of appeals. Br. 49; Pet. App. 12a. This he cannot do without a cross-petition. *Northwest Airlines, supra.*

In any event, Independent Counsel's positions, like those of the court of appeals, should be rejected.

I. ATTORNEY-CLIENT PRIVILEGE.

A. Confidentiality is necessary to foster candor between client and attorney.

1. Independent Counsel argues that "the rule that the privilege does not apply after death in criminal proceedings should cause *no* chilling effect whatsoever on *appropriate* attorney-client communications—that is, on clients who intend to testify truthfully or assert the Fifth Amendment." Br. 39 (emphasis in original). In other words, his position is that only those who intend to commit perjury will be restrained by such a rule. This argument, however, is contrary to case law, common sense, and the experience of the legal profession reflected in the briefs of amici attorney associations, which Independent Counsel ignores.

The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also United States v. Zolin*, 491 U.S. 554, 562 (1989); *Fisher v. United States*, 425 U.S. 391, 403 (1976). The privilege promotes free and unrestrained conversations by ensuring that these conversations are, and remain, "off the record," and is intended to benefit *all* clients in need of legal advice. Common sense and the legal profession's experience teach that even truthful people may need to talk to a lawyer in confidence and that those conversations may well be chilled by fear of disclosure after death. The rule that the privilege survives death is not intended to benefit the perjurer.

Independent Counsel recognizes the "importance" of the attorney-client privilege when the client asserts the Fifth Amendment privilege. Br. 33. However, he suggests that, because the deceased client cannot be prosecuted, the client planning to assert this privilege would not be chilled by the prospect of the attorney's revealing their conversations after death. This disregards the obvious harm such disclosure could have on the client's reputation and the fate of others.

Independent Counsel contends that federal law recognizes the attorney-client privilege in cases *where the client testifies* for two reasons. Br. 35-37. First, if the client testifies there is little need for the attorney also to do so. Second, to allow the attorney to testify would create a litigation side-show focusing on discrepancies between the attorney's and the client's testimony. But Independent Counsel overlooks the most salient reason for recognizing the privilege: to encourage candid conversations between the attorney and the client. Fear of revelation of those candid conversations after death would chill them.

To abandon the need for candor as the basic reason for the privilege would throw its legitimacy into doubt even for the living. The litigation side-show rationale is insufficient to support the privilege because it would not protect the privilege in pretrial discovery. Moreover, neither that rationale nor the claim that the attorney's testimony is unnecessary justifies the privilege when the client is unavailable to testify because of flight, illness, or loss of memory. The Fifth Amendment analogy is an inadequate justification because it has no application in purely civil matters. Encouragement of candor, therefore, remains the chief reason for the privilege.

Clients must be able to talk freely and without restraint with attorneys "if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980). The client who is overly cautious and circumspect may fail to reveal matters the lawyer should know. Lawyers doing their job *encourage* clients freely to express their suppositions, emotions, doubts, fears, speculations, and the like.

Once the client has freely confided in the lawyer, the lawyer can help sort the relevant from the irrelevant, separate what the client actually knows from guesswork and speculation, assist the client in thinking through apparent inconsistencies, and prod the client into testing personal recollections against available documents and the statements of others. After that process, the lawyer will have an accurate basis for giving advice, and the client will be better equipped to present a cogent, *truthful* account, if testimony is required.[1] But this process—which is fully appropriate and replicated daily in law offices across the country—cannot operate effectively unless the client is first able to confer with a lawyer in confidence without restraint.

The difficulty of sorting a client's surmises and speculations from actual knowledge is particularly acute when the client speaks about the activities of friends, family or associates. Here suspicion may be more prevalent than knowledge. A client knowing that the conversation with counsel is confidential can—and often should—voice all his or her fears and suspicions about others, even if they have little foundation. But it could well be irresponsible to impugn others by speculation and surmise knowing that a prosecutor or a grand jury could become privy to the conversation. That is one reason why a person who intends to be truthful in later testimony must be able to speak first with a lawyer in confidence. Independent Counsel's suggestion that a client may not, in a privileged setting, retain and consult a lawyer about the legal difficulties of others (particularly those relating to his or her own conduct) is simply wrong.[2]

[1] It is much too simplistic to say, as Independent Counsel does, that "[t]he client who will testify truthfully . . . will simply tell her attorney the same *facts* that she will disclose under oath." Br. 35 (emphasis in original). Anyone who has practiced law knows that, *even as to the wholly truthful client*, some aspects of the private conversations with the lawyers may differ from later "on the record" testimony. At any given time (even just before the client's death) the lawyer, and perhaps the client, may not know with any completeness what the "facts" are, particularly if the matter is complex and involves multiple parties. We expect that what Independent Counsel eventually wants from Mr. Hamilton is not just "facts," but his testimony about everything, speculations included, Mr. Foster said to him. To allow that sort of probing into an attorney's recollections of a conversation with a client would chill client candor and have pernicious effects on the practice of law and the administration of justice.

In short, Independent Counsel's position that only intended perjurers will eschew candor if they fear their conversations with counsel will be posthumously revealed contravenes reason and experience. Clients who intend truthful testimony, as well as those who intend to assert their Fifth Amendment privilege, also would be restrained.

2. Independent Counsel concedes that clients anticipating death may care about their reputation and about the fate of family, friends and associates. Br. 43-44. He argues, however, that a client's desire to protect others and his or her own reputation does not justify nondisclosure after death because the client could be forced to testify about such matters before death. "*[T]he information*" disclosed by the attorney, he says, "*is the same factual information that the client himself would have been legally required to disclose if he were alive.*" Br. 44 (emphasis in original). This argument attacks the very fundamentals of the privilege.

The attorney-client privilege is not intended only to protect incriminating information the client cannot be forced to reveal. Rather, it is based chiefly on the need to foster client candor. If a client anticipating death cannot talk to a lawyer freely about matters implicating fam-

[2] *See* Br. 29. Independent Counsel asserts that a person consulting an attorney "to enable the attorney to advise or assist someone else" may not claim the privilege. Br. 45 n.45, quoting Larkin, *Federal Testimonial Privileges* § 2.02 at 2-17. But a client may want legal advice for the client's own benefit about the activities of friends, family and associates, either because that conduct may implicate the client or for other reasons. As long as the person consulting the attorney is seeking legal advice (rather than arranging for the attorney to provide advice to someone else), he or she is entitled to the privilege.

ily, friends, associates and his or her own reputation because the lawyer later might be turned into a funnel to the prosecutors, the client might well not talk at all—and thus there would be no information to discover. It thus is not at all clear, as Independent Counsel argues, that the costs of protecting attorney-client communications after death are high, because if the privilege dissipates upon death such communications might not be made.

As discussed above a client's discussion with a lawyer may be expansive, involving speculation, rumor, factual uncertainties, and the like. That a client later could be required to testify about certain facts after receiving professional assistance and advice should not make such wide-ranging conversations any less confidential. To conclude otherwise would be to squelch the types of communications necessary for the legal system to function.

B. There is no basis for Independent Counsel's assertion that the chilling effect of posthumous disclosure would be "marginal."

Independent Counsel concludes—contrary to the views of amici attorney associations—that the chilling effect of the rule he espouses would be "extraordinarily marginal." Br. 39. None of his arguments in this regard has merit.

1. Independent Counsel suggests that clients will not be chilled because they will not learn about the confidentiality exception he proposes. Br. 39-40. We have no doubt, however, that any decision by this Court vitiating the privilege after death would receive widespread publicity, particularly among the aged and ill.

2. Independent Counsel asserts that clients already are chilled by the lawyer's obligation to reveal client perjury. As remarked, however, even truthful people often need to talk to a lawyer in confidence. For the truthful client, fear of what the lawyer might do if perjury occurred would *not* be important. But fear of disclosure after death—particularly where the client is elderly, ill or suicidal—would chill candor, and that is why the privilege should survive death.

3. Independent Counsel rightly observes that prosecutors rarely have sought disclosure of attorney-client communications after the client's death. This is the first reported federal case; there is only one reported state case.[3] This circumstance may be because prosecutors with "the perspective that multiple responsibilities provide"[4] understand that the law is settled and that ultimately the government and law enforcement benefit if clients are candid with their attorneys. However, if this Court holds such evidence obtainable, federal prosecutors will have no choice but to seek it and inhibited candor will be the by-product.

4. Independent Counsel contends that grand jury secrecy and admissibility rules will minimize the chilling effect of the disclosure he seeks. But a client would be restrained by the prospect that friends, family or associates could be indicted as a result of disclosure, even if the evidence that led to indictment is not admissible at trial. Moreover, inadmissible attorney writings might be utilized at trial, for example, to refresh recollection or to cross-examine. Lack of admissibility would not ensure that attorney-client information remains confidential.

5. To disparage the chilling effect of posthumous disclosure, Independent Counsel *repeatedly* asserts that criminal prosecution after death would not affect the client's estate. Br. 9, 16 n.11, 22, 29. This contention rests on the bizarre notion that persons contemplating death care only about the magnitude of their estates and not about whether family, friends or associates might be incarcerated —a notion contrary to reason and experience. This assertion also is demonstrably wrong, for criminal proceedings can decimate an estate by leading to property forfeitures,

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[3] *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990). In the other state cases excluding such evidence from criminal trials (cited in our principal Brief at 19 n.16), the defense sought the evidence; the prosecution opposed.

[4] *Morrison v. Olsen*, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

fines, restitution, and huge legal fees.[5] Even from a purely economic standpoint, criminal proceedings can be at least as disastrous as civil proceedings, and both the court of appeals and Independent Counsel concede that the privilege survives death in civil proceedings because of the effect of a contrary rule on a decedent's estate.

C. There is no support for distinguishing between criminal and civil proceedings in applying the attorney-client privilege.

Independent Counsel argues that privileges that apply in civil proceedings may not apply in criminal proceedings. That may be true for certain *qualified* privileges, where a balancing test applies and the interests supporting disclosure in a criminal proceeding may be weightier than in a civil case. *See United States v. Nixon*, 418 U.S. 683, 711-12 & n.19 (1974) ("President's generalized interest in confidentiality"); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (journalist's privilege).[6] But the argument has no support in cases involving absolute privileges where balancing tests are not utilized.[7]

The civil-criminal distinction especially fails in the context of the attorney-client privilege. Lawyers frequently

[5] *See* United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (1998 ed.), §§ 5E1.1 (Restitution), 5E1.2 (Fines for Individual Defendants). Examples of statutes providing for forfeiture as a result of criminal conduct are: 18 U.S.C. § 981 (forfeiture for a list of offenses); 21 U.S.C. § 853 (forfeiture of assets traceable to narcotics violations); 18 U.S.C. § 1955(d) (forfeiture of property connected to illegal gambling); 26 U.S.C. § 7301 (forfeiture of property connected to tax avoidance); 18 U.S.C. § 1963(e) (forfeiture under RICO).

[6] *But see University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* followed in a civil enforcement proceeding).

[7] Independent Counsel cites McCormick's statement that some state statutes deny the physician-patient privilege in criminal cases. Br. 11, citing 1 *McCormick on Evidence* § 104, at 388 (4th ed. 1992). However, McCormick concedes that, "[i]n the absence of specific limiting language, the [physician-patient] privilege will generally be held to apply to criminal as well as civil cases." *Id.* at 388 n.4.

are consulted in situations where both civil and criminal liability is possible. Matters concerning securities, tax, antitrust, fraud or RICO laws all could involve either civil or criminal liability.[8] It is nonsensical to contend, for example, that a conversation involving a client's liability under the securiites laws is inviolate after death in a civil case, but accessible by a grand jury. To attempt to explain such a dichotomy to a client hardly would foster client candor.[9]

D. The decision discriminates against the dying.

Independent Counsel argues that extinguishing the privilege at death would not discriminate against the dying because (1) they "most likely" would consult lawyers about wills or property dispositions, and (2) the will contest exception already negates the privilege. Br. 16-17, 45-46. However, while a person near death might be concerned about bequests and a will contest might develop (without which the exception does not apply), the client might well wish to consult a lawyer for some other purpose, including grand jury investigations that might involve the client or others. Mr. Foster, after all, did not seek out Mr. Hamilton to confer about estate planning. To rob the dying of

[8] *See, e.g.*, 18 U.S.C. §§ 1963 (RICO criminal penalties), 1964 (RICO civil liabilities); 15 U.S.C. §§ 1, 2 (antitrust criminal penalties), 15 (antitrust civil liabilities), 77k, 77l (Securities Act civil liabilities), 77x (Securities Act criminal penalties).

[9] Independent Counsel argues that disclosure is needed in criminal proceedings, because nondisclosure may allow " 'a murderer . . . still at large and likely to strike again' to evade justice." Br. 24 (quoting *In re John Doe Grand Jury Investigation, supra*, 562 N.E.2d at 73 (Nolan, J., dissenting)). Present ethical rules address public safety, allowing disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." ABA Model Rules of Professional Conduct, Rule 1.6(b)(1). While these rules do not directly concern possible future criminal conduct by third parties, they at least suggest that a lawyer's ethical obligations would not protect such information. In any event, the present case does not raise a public safety issue, and any "public safety" exception that might be fashioned likely would not depend on whether the client was dead.

confidentiality as to nontestamentary matters is discriminatory.

Independent Counsel also says there is no discrimination against the dying because the client must testify truthfully and the attorney "simply" must disclose the same information the client would have disclosed. We have dealt with the essence of this wrong-headed argument above, but here make an additional point. The dying would often know that, as a practical matter, they never will testify in a criminal proceeding because death will overtake other events. The Court will recall that Mr. Foster died only nine days after he spoke with Mr. Hamilton. Under either the court of appeals' or Independent Counsel's formulation, if the client near death declines to speak with a lawyer, his or her secrets go to the grave; but if the client does consult an attorney, whose advice may be desperately needed, disclosure of those secrets is a distinct possibility. To force this Hobson's choice on dying clients discriminates against them.

E. Existing law overwhelmingly supports survival of the privilege after death; the commentators are split.

Independent Counsel argues that the "vast majority" of state cases supports his position, as well as state statutes and the "virtual consensus" of commentators. Br. 14, 16. This claim is both wrong and misleading.

1. The "vast majority" of state cases Independent Counsel refers to involve the "testamentary exception" where the privilege is waived for the sole purpose of obtaining evidence as to the client's testamentary intent. Br. 16. But these cases, and the state statutes that codify the testamentary exception, recognize that it is just that—an *exception* to the general rule that the privilege survives death.[10]

[10] *See Glover v. Patten*, 165 U.S. 394, 408 (1897) (exception described as a "waiver" of the general rule of confidentiality); *Blackburn v. Crawfords*, 70 U.S. 175, 194 (1865) (same); *Hitt v.*

Independent Counsel argues that these cases represent a policy determination that correctly disposing of an estate trumps the interest in preserving the confidentiality of the deceased's conversation with counsel who drafted the will. The issue of whether a crime was committed and by whom, he then contends, is at least important as "who gets Blackacre," and the needs for such information "*are surely sufficient to trump the privilege after death.*" Br. 17 (emphasis in original).

But this analysis overlooks the basic notion that the "testamentary exception" is designed to implement the client's testamentary intent. This Court in *Glover v. Patten*, 165 U.S. 394, 408 (1897), recognized that this is so; numerous other cases concur.[11]

Attempting to find (or invent) similar intent in the criminal investigation situation, Independent Counsel makes an extraordinary statement. It is, he says "'fair to presume' that the client would have wanted to provide

Stephens, 675 N.E.2d 275, 278 (Ill. Ct. App.), *appeal denied*, 679 N.E.2d 380 (Ill. 1997) ("[t]he only context in which a client's death might affect the viability of the privilege is a will contest"); *Doyle v. Reeves*, 152 A. 882, 883 (Conn. 1931) (will contest rule is a "recognized exception"); *Succession of Norton*, 351 So. 2d 107, 112 (La. 1977) ("exception" to general rule that "the death of the client does not terminate the privilege").

Rule 502 of the Uniform Rules of Evidence describes the will-contest rule as an "Exception" to the "General Rule of Privilege," as do 18 of the statutes that adopt the Uniform Rules; Alabama, Alaska, Arkansas, Delaware, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, South Dakota, Texas and Wisconsin (cited in our principal Brief at 21-22 n.22). The California Evidence Code, § 953, also labels the will-contest rule as an "Exception."

[11] The cases cited in n.10 *supra* all state or indicate that implementing the client's testamentary intent is the basis for the testamentary exception. Examples of other cases relying on the client intent rationale are: *Clark v. Turner*, 183 F.2d 141, 142 (D.C. Cir. 1950); *Doherty v. O'Callaghan*, 31 N.E. 648, 650 (Mass. 1892); *In re Cunnion's Will*, 94 N.E. 648, 650 (N.Y. 1911); *Bergsvik v. Bergsvik*, 291 P.2d 724, 731 (Or. 1955); *Hugo v. Clark*, 99 S.E. 521 (Va. 1919); *Holty v. Landauer*, 52 N.W.2d 890, 892 (Wis. 1952).

relevant information to the grand jury." Br. at 19. He derives this supposed presumption from the citizen's duty to testify before the grand jury. But citizens also have a duty to pay taxes, and the Court should not presume that a client would want everything he says to his or her tax attorney revealed to the IRS. Nor can a similar presumption rationally be made in many grand jury situations where the client's own reputation may be at stake, as well as the fate of family, friends and associates. To base negation of the privilege at death on such a doubtful presumption would be to ignore reality. To apply the privilege after death in criminal proceedings, but not in will contests, will not create "an irrational asymmetry in the law" because reason and experience tell us that different presumptions as to client intent should pertain, as amici attorney associations confirm.

2. Independent Counsel also claims support from state statutes providing that the deceased client's personal representative may assert the privilege. He argues that criminal proceedings have no relevance to the administration of estates, and thus these statutes impliedly limit the posthumous privilege to civil proceedings.

None of these codes (including the Arkansas statute governing Mr. Foster's still-open estate) states that they are limited only to civil matters. Indeed, some have been applied in criminal cases to uphold the privilege.[12] Moreover, Independent Counsel is wrong to assert that criminal proceedings have no relevance to estate administration, because criminal proceedings may result, *e.g.*, in forfeitures that could deplete an estate. He also disregards the many state evidence codes (including Arkansas') that allow the deceased's *attorney* to claim the privilege—provisions that cannot be read as limited to civil proceedings. Indeed, one such statute has been applied in a criminal case.[13]

[12] In *People v. Pena*, 198 Cal. Rptr. 819, 828 (Cal. Ct. App. 1984), the court in a criminal trial relied on the California Code provision authorizing the decedent's personal representative to assert the privilege to sustain exclusion of a communication between the decedent and his attorney. *See also Cooper v. Oklahoma*, 661 P.2d 905, 907 (Okla. Crim. App. 1983) (citing similar provision of Oklahoma Code to support exclusion of decedent's privileged communication in a criminal trial); *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990) (allowing administratrix of decedent's estate to assert privilege in response to motion to compel attorney's testimony before grand jury).

3. Also relevant are the reason and experience reflected in bar and state ethics opinions. The consistent position is that the attorney's obligation of confidentiality survives death.[14]

4. Independent Counsel's assertion that he is supported by a "virtual consensus" of "overwhelming scholarly authority" (Br. 12-15) exaggerates. The commentators' views are canvassed in our opening brief (at 23-24). Suffice it to say here that all commentators concede that the case law supports posthumous application of the privilege; that none supports the view that the posthumous privilege operates differently in criminal and civil proceedings;[15] that certain commentators supporting termination of the privilege argue that people care little about what happens after

[13] *See* our principal Brief at 23 n.25. *Cooper v. Oklahoma*, *supra*, cited the Oklahoma statute allowing the attorney to claim the privilege in sustaining exclusion from a criminal trial of a deceased client's statements.

[14] *See* ABA Ethics Committee Informal Opinion 1293 (confidences must be preserved following client's death). State and local bar opinions adopting the same rule are summarized in ABA/BNA, *Lawyers' Manual on Professional Conduct*, ¶¶ 801:4361 (Maryland), 801:1710 (LA County), 801:6609 (North Carolina), 901:1033 (Alabama), 901:2069 and 2070 (Connecticut), 90:5102 (Mississippi), 901:6265 (Nassau County), 901:8606 (Vermont), 901:9110 (Wisconsin), 1001:6001 (New Mexico), 1001:7313 (Pennsylvania). This Court has looked to bar pronouncements in determining reason and experience. *Upjohn*, *supra*, 449 U.S. at 390-91.

[15] We read Mueller and Kirkpatrick to contend that the privilege should be overcome posthumously to avoid "extreme injustice" both in civil and criminal cases. 2 Mueller & Kirkpatrick, *Federal Evidence*, § 199 at 380 & n.11 (2d ed. 1994).

they die—a view Independent Counsel does not defend;[16] and that some commentators (Wigmore and Frankel) agree that the case law represents sound policy, while others (Hazard and Hodes, Weinstein, Epstein, Rice) do not criticize the present rule. In addition, one commentator Independent Counsel cites is fundamentally antagonistic to the privilege and this Court's decisions applying it, making reliance on his views dubious at best.[17]

5. Independent Counsel contends that the cases offer little reasoning to support survival of the privilege after death. Br. 21. However, survival is so well-established that extended discussion may have been deemed unnecessary. Moreover, the only nontestamentary case supporting termination of the privilege at death is a *civil* case that—if the position advocated by Independent Counsel or the court of appeals is adopted—was wrongly decided. *Cohen v. Jenkintown Cab Company*, 357 A.2d 689, 692-94 (Pa. Super. Ct. 1976).

By contrast, a leading recent decision holding that the privilege survives death in a *criminal* case contains an extensive discussion supporting that conclusion. It explains that, in many instances, a contrary rule would "so deter the client from 'telling all' as to seriously impair the attorney's ability to function effectively," a result "inconsistent wtih the traditional value our society has assigned, in the interest of justice, to the right to counsel and to an effective attorney-client relationship." *In re John Doe*

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[16] *See* 24 Wright & Graham, *Federal Practice and Procedure*, 5498, at 484 (1986) (concern for posterity would be "Pharaoh-like"); Wolfram, *Modern Legal Ethics*, § 6.3.4 at 256 (1986) (concern over post-death disclosure would be "mythic").

[17] Professor Fischel believes that in *Upjohn* "[t]he Court got it exactly backwards." Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 29 (1998). He concludes that "the ethical duty of confidentiality, the attorney-client privilege, and the work product doctrine . . . are of dubious value to clients and society as a whole" and "[a]bsent some more compelling justification for their existence than has been advanced to date, these doctrines should be abolished." *Id.* at 33.

Grand Jury Investigation, 562 N.E.2d 69, 71 (Mass. 1990).

F. Independent Counsel cannot rely on possible defendant rights to enhance his ability to obtain evidence.

This case involves a prosecutor and grand jury's attempt to break the privilege and obtain evidence; it does not concern the rights of criminal defendants. Independent Counsel, however, asserts a principle of evidentiary neutrality, claiming that, if a defendant has a right to obtain exculpatory information despite a privilege, a grand jury has a similar right because it is empowered to command information that will protect the innocent. Br. 24-27. This effort to piggyback on possible defendant rights fails for several reasons.

First, there is no principle equalizing the rights of grand juries and defendants to obtain evidence. Defendants have a due process right to obtain material exculpatory evidence the government possesses. *Brady v. Maryland*, 373 U.S. 83 (1963). Prosecutors have no right to force inculpatory testimony from defendants, and Fed. R. Crim. P. 16(b)(2) further limits their pre-trial discovery rights. Defendants have a right to exclude evidence prosecutors obtained illegally; prosecutors have no comparable right to exclude defendants' evidence. 1 *McCormick on Evidence* (4th ed.), § 173 at 707-08; *Weinstein's Federal Evidence* (2d ed. 1997) § 512.05. Defendants have a special Sixth Amendment right to confront and cross-examine. Prosecutors, however, may obtain a court order immunizing a witness claiming the Fifth Amendment, an investigative technique defendants do not enjoy.

Moreover, criminal defendants have no general right to override valid privileges. The state criminal cases actually reaching the issue all have decided that the attorney-client privilege prevails over a defendant's rights to obtain evidence. More broadly, rules that " 'accommodate other legitimate interests in the criminal trial process' " override a defendant's right to present a defense unless those rules

are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *United States v. Scheffer*, 118 S.Ct. 1261, 1264 (1998), quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987).

It may be that, despite the transcendent interests the attorney-client privilege serves, some rare circumstance will arise where its application after the client's death would be unconstitutionally "arbitrary" or "disproportionate." *Compare Davis v. Alaska*, 415 U.S. 308 (1974). But the Court need not and should not decide that issue here.[18] Here, Independent Counsel claims that the grand jury is entitled to obtain privileged material *whenever it is relevant*, without attempting to demonstrate that anyone would be arbitrarily or disproportionately harmed by denying disclosure. Br. 41 n.40.[19] Even under the most liberal

[18] *Upjohn, supra*, 449 U.S. at 396; *Jaffee v. Redmond*, 508 U.S. 1, 18 (1996).

We note that courts often have found ways to do justice without violating the attorney-client privilege. Various courts have refused, on conflict-of-interest grounds, to allow a husband accused of murdering his wife to assert her privilege to exclude evidence potentially harmful to him. *Arizona v. Gause*, 489 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); *Wyoming v. Kump*, 301 P.2d 808 (Wyo. 1956); *District Attorney v. Magraw*, 628 N.E.2d 24 (Mass. 1994). In *Magraw* a probate court, at the district attorney's behest, removed the husband as executor and appointed another, thereby negating his ability to assert the privilege. In *Arizona v. Macumber*, 544 P.2d 1084 (Ariz. 1976), the exemplar case for those asserting that maintaining the privilege after death can produce untoward results, the Arizona Supreme Court reversed the conviction on another ground. Then, on remand, the privilege appropriately was waived. However, the attorney evidence eventually was deemed untrustworthy and not admitted. *Arizona v. Macumber*, 582 P.2d 162 (Ariz. 1978). That result was not surprising; allegations that someone since dead admitted the crime—"someone who will neither contest the allegations nor suffer punishment as a result of them"—are "not uncommon" and "are to be treated with a fair degree of skepticism." *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring).

[19] A prosecutor's determination of relevance is virtually impossible to contest in the grand jury context. A person challenging a grand jury subpoena on relevance grounds must show "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

interpretation of a defendant's constitutional rights, a defendant would not be entitled to pretrial discovery of any privileged material defense counsel might think relevant.[20]

II. WORK PRODUCT.

A. The client's death does not terminate the work product privilege, which also belongs to the attorney.

Independent Counsel argues that the work product doctrine exists only for the benefit of the client and therefore must expire with the client's death. Br. 46-47. This argument is flatly wrong and is contrary to the very case Independent Counsel cites for it. *Moody v. IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981)

Moody held that the work product privilege "creates a legally protectable interest in non-disclosure in two parties: lawyer and client," and that the "lawyer has standing to protect 'confidentiality necessary to proper preparation of a case . . .'; that is, that degree of privacy necessary to function as an effective advocate." *Moody v. IRS, supra*, 654 F.2d at 801 and n.22 (citation omitted). Even the court of appeals in the immediate case recognized that the work product privilege protects " 'a complex of individual interests particular to attorneys that their clients may not share.' " Pet. App. 11a, quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).[21]

[20] The recent decisions limiting the attorney-client privilege for governmental attorneys do not affect this case. Both make clear that they do not apply to government employees seeking advice from private attorneys. *In re Grand Jury Proceedings*, D.D.C. May 27, 1998 (Misc. Nos. 98-095, 98-096 & 98-097 (NHJ)), slip op. 22-27; *In re Grand Jury Subpoena*, 112 F.3d 910, 921 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997).

[21] Other cases holding that the work product privilege belongs to the lawyers involved include *In re Special September 1978 Grand*

Here the work product privilege belongs to two persons—Mr. Foster and Mr. Hamilton. Unfortunately, Mr. Foster is not here personally to assert it, but Mr. Hamilton is and does. Independent Counsel's argument in this regard, made but not adopted below, is untenable.

B. There is no basis for reversing the district court's finding that the notes reflect the attorney's mental impressions; the grand jury's need does not outweigh the privilege.

Alternatively, Independent Counsel asks this Court to determine that Mr. Foster's death created a sufficient need to overcome the work product privilege with respect to factual portions of the notes. Br. 47-48. Independent Counsel ignores the district court's finding that "the need of the grand jury does not outweigh the privileges asserted." Pet. App. 52a. He does not attempt to defend the court of appeals' basis for reversing that finding—*i.e.*, the erroneous conclusive presumption that lawyers do not exercise professional judgment in taking notes at initial client interviews.

There is not, as Independent Counsel contends (Br. 47), a "settled rule" allowing disclosure in the circumstances at hand. Rather, under the district court's finding that the notes "reflect the mental impressions of the lawyer" (Pet. App. 52a), the notes are entitled to "the super-protective envelope reserved by Rule 26(b)(3) for 'mental impressions' " (Pet. App. 13a-14a), and may not be produced using the ordinary standard of need applied by the court of appeals. The district court's finding is supported by the record and by common sense—an attorney simply cannot take three pages of notes during a two-hour interview without exercising professional selectivity. Redaction of the notes to eliminate explicit expressions of opinion would not protect the lawyer's exercise of his professional judgment in selecting what information to record.[22]

Jury, 640 F.2d 49, 63 (7th Cir. 1980) (lawyer may assert privilege to protect opinion work product, even though client could not do so because of participation in fraud); *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994). *See* Larkin, *Federal Testimonial Privileges*, § 11.03 at 11-53 (1998) ("The principal possessor of the right to invoke the benefits of the [work product] doctrine is the attorney or agent who prepared the materials in anticipation of litigation or for trial.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[22] Independent Counsel cites two decisions in which courts have required production of attorney notes of witness interviews. *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (decided before *Upjohn*). Both cases, however, recognized that attorney notes reflecting mental processes enjoy heightened protection and did not allow disclosure of attorney thought processes. The descriptions of the notes involved in those cases demonstrate that they did not resemble the highly fragmented, selective notes Mr. Hamilton took. *See* 675 F.2d at 487 (notes were "recitations of [witness'] statements"); 599 F.2d at 1231-32 (interview notes were embodied in "memoranda" containing "factual recitation.")

Independent Counsel also cites Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 354 (1997), for the proposition that a witness' death is usually sufficient to require production of work product materials. That statement, however, was directed at ordinary work product, not opinion work product such as involved here.